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No. 85-43

In the Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL SENFT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of fair warning that their conduct was illegal.

2. Whether the district court (a) correctly declined to instruct the jury on petitioners' claim of reliance on advice of their accountants, in light of the absence of any support in the record for such a claim, and (b) correctly excluded testimony concerning advice that attorneys assertedly gave to a business associate of the petitioners, in light of the facts that the alleged advice did not address the legality of petitioners' conduct under the tax laws and that there was no evidence to indicate that petitioners had relied on any such advice.

3. Whether petitioners' right to a unanimous verdict was violated when the district court accepted the jury's verdicts on some but not all counts of the indictment.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1985. A petition for rehearing was denied on May 10, 1985. The petition for a writ of certiorari was filed on July 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were each convicted of conspiracy to defraud the United States by impeding and obstructing the lawful functions of the Internal Revenue Service through the creation of fraudulent tax deductions, in violation of 18 U.S.C. 371. Petitioner Michael Senft was also convicted

on 12 counts of aiding and assisting the filing of false income tax returns, in violation of 26 U.S.C. 7206(2), and one count of attempted evasion of federal income tax, in violation of 26 U.S.C. 7201. Petitioners Antonucci and David Senft were each also convicted on 12 counts of aiding and assisting the filing of false tax returns, and petitioner Orchard was convicted on one such count (C.A. App. 391). Petitioner Michael Senft was sentenced to a total of 15 years' imprisonment and fined $80,000. Petitioner Orchard was sentenced to four years' imprisonment and a $15,000 fine; petitioner David Senft to two years' imprisonment, three years' probation, and a $70,000 fine; and petitioner Antonucci to six months' imprisonment, three years' unsupervised probation, and a $10,000 fine (C.A. App. 486). The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial "convincingly established [petitioners'] guilt on all the counts on which they were convicted" (Pet. App. 2a) and involved "overwhelming proof of knowing and intentional fraud" (*id.* at 4a). In brief, petitioners engaged in a scheme to supply customers with documentation for fraudulent tax deductions based on losses purportedly suffered in alleged trading in government securities.

Under the overall direction of Michael Senft, petitioners' activities took place essentially in two stages. In 1979 and 1980, petitioners operated Sentinel Financial Instruments (SFI), a New York limited partnership. Petitioners sold investors a program allegedly involving trading in Department of Treasury bills and notes. According to its literature on this program, SFI would obtain for its customers pairs of positions in Treasury bills and notes "hedged" to minimize the financial risk to the investor. Under the arrangement, a customer would purportedly purchase notes payable on a certain future date, and at the same time sell bills "short"—*i.e.*, bills

that the customer did not yet own—payable at about the same time. The hedged trades were to be designed so that near the end of the first tax year the customer would recognize a loss on the unprofitable leg of the hedged pair of positions (typically, by purchasing Treasury bills to "cover" the short sales), which he could deduct from ordinary income; then, in the second year, he would recognize corresponding gain on the other leg of the hedged pair (typically, by selling Treasury notes), which would be taxable at the lower rates for capital gains. SFI represented that it would attempt to make an economic profit for the investor by investing at times when the anticipated increase in the value of Treasury notes would be greater than the increases in the value of bills. SFI purportedly would make its profits chiefly by charging a mark-up or mark-down on bills it sold or bought on behalf of customers. Tr. 169, 177, 182; GX 102, at 2-4, 8-14.

In reality, however, the SFI program operated in an entirely different fashion. In effect, the customer merely indicated the amount of tax loss he desired and furnished as a "deposit" an amount computed as a percentage of that desired loss. SFI then created a paper trail of documents for nonexistent "trades" of bills and notes that made it appear that the customer had suffered the desired loss by actual trading in that year. See, *e.g.*, C.A. App. 429-430; Tr. 169-172, 627-630; GX 106.[1]

Specifically, petitioners made accounting entries showing that bills or notes had been bought from or sold to SFI by customers at indicated prices on given dates. SFI was on the other side of all its customers' purported "trades." Sufficient "trades" were created for a cus-

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[1] Since they were not needed for actual trading, funds purportedly collected from customers as "margin deposits" for such trading were, in fact, invested in corporate bonds for SFI's account (Tr. 513).

tomer's account to establish the desired loss for the customer in the first year and a corresponding capital gain in the later year. In fact, however, no actual trading of securities occurred, and the accounting entries never evidenced any actual transactions or indebtedness between parties. The purported trades were recorded not at current market prices, but typically at prices based on the previous day's trading as reported in the *Wall Street Journal.* The "trading" results were created so that no customer would take an economic profit or loss no matter what happened in the actual government securities market.[2] See C.A. App. 280; Tr. 169-172, 174-179, 346, 353-354, 611-616, 629, 703-705, 1133.

Moreover, the "trading" accounting entries were routinely disregarded or altered after the fact. Most often this was done by retroactive creation of alleged trades (Tr. 198-218, 355-363, 469-470, 518-520, 566-567, 618-619, 625-626, 856-857, 979-981, 1479-1480; GX 324). For example, when in early 1980 petitioners discovered that the desired losses for 1979 had not been achieved for many customers, they simply changed their accounting entries to indicate that trades had been made during 1979 (Tr. 198-218, 567, 618-619, 626). Thus, the reality was that from the day an account was opened, the customer's tax loss for the first year, the amount of his deposit that was to be kept by SFI as its fee, and the amount thereof to be returned to the customer at the end of his program were already known (C.A. App. 429-430; Tr. 169-172, 353-354, 615-616, 627-630, 703-705; GXs 106, 303).

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[2] The sole exception to this rule was that a few individuals were selected by petitioners to make economic profits, and a few actual trades were performed, expressly to conceal the scheme from potential IRS audits (see Tr. 218, 225, 242-243, 521-524, 563, 626-627, 708-709, 713, 1460-1461).

In 1980, petitioners created a new limited partnership, Sentinel Government Securities (SGS), to conduct in a slightly different way their scheme of creating false tax deductions. In this program, customers would become limited partners in SGS. Thus, instead of executing purported trades for a customer's own account with SFI on the other end of each trade, trades would purportedly be carried out between SGS itself and another securities dealer. The purported tax deductions would then be "passed through," pursuant to partnership tax provisions, to the limited partners of SGS in their allocable shares (Tr. 631-632).

As with SFI, however, the actual operation of SGS consisted of accepting fees from customers in return for the creation on paper of alleged trades that in fact had no economic significance. SGS negotiated arrangements with other government securities dealers under which, for a fee paid by SGS to the other dealer, documents attesting to purported trades between the dealers would be created showing that SGS had achieved the desired losses in one year and corresponding gains in later years. The transactions were prearranged so that, beyond the fee, both sides would be guaranteed of having no economic gain or loss (Tr. 634-637, 710, 753-761, 858-861, 913-916, 956-957, 1269-1271, 1278-1281, 1388-1394). To disguise the nature of the transaction, the fee was to be paid through a series of additional prearranged transactions in which SGS would intentionally lose money to the other dealer (Tr. 635-637, 759-760, 916-917). Once again, backdating of transactions was routinely employed when necessary to ensure that tax losses were created by the end of a tax year (Tr. 1010-1011, 1479-1483, 1582(12)-1582(17)).

Under the SFI and SGS schemes, petitioners generated for their customers a total of approximately $130 million in fraudulent tax deductions for the tax

years 1979 and 1980 (Tr. 1506-1510). Michael Senft, as a partner in SGS, personally used his fraudulent deduction to reduce his 1980 taxable income from $1,866,076 to zero (Tr. 1511, 1515-1516).

ARGUMENT

1. Petitioners argue (Pet. 9-15) that they could not reasonably have anticipated that the activities that led to their convictions were illegal, and thus that their right to "fair warning" under the Due Process Clause of the Fifth Amendment was violated. Citing the Tax Court's decision in *Smith* v. *Commissioner,* 78 T.C. 350 (1982), they contend that their "tax shelter" program was similar to the "tax straddle" plan involved in *Smith* that the Tax Court found was not a total sham, and hence that they were criminally convicted in this case for offering their customers what they could have believed to have been at least an arguably valid tax shelter program.[3]

Contrary to their argument, the scheme actually operated by petitioners was a far cry from the program at issue in *Smith.* In the program involved in the *Smith* case, taxpayers made so-called "butterfly straddle" investments in commodity futures, which involved "hedged" pairs of contracts to buy and to sell the same commodity on different future delivery dates. All trades were in fact duly registered and carried out in the official sessions of the regulated Commodities Exchange, Inc. (COMEX). In the portion of the *Smith* opinion cited by petitioners (78 T.C. at 372-385), the Tax Court concluded that these individual transactions were not total shams devoid of substance, since the investors actually

[3] Petitioners do not contend that they actually relied on *Smith,* which was decided after they had engaged in the conduct charged in this case.

entered into real, legally binding obligations to buy and sell commodities pursuant to valid COMEX rules in authorized COMEX trading sessions (see especially 78 T.C. at 385).[4]

In this case, while the program advertised by petitioners may have had some similarities to that in *Smith*, the scheme actually operated did not. No actual trades were ever conducted or registered on any exchange. Moreover, it is clear that the accounting entries in the SFI and SGS books, supposedly signifying effective and binding trades between distinct parties, had in reality no substance whatsoever. The final results of each customer's trading were exactly preordained, and customers were specifically precluded from ever obtaining any profit. And the accounting entries were routinely created long after the alleged fact, backdated, and changed; for example, if accounting records showed that previously recorded "trades" left one party "owing" another an amount not anticipated, the entries were changed or another "trade" was created on paper to

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[4] In *Smith*, the Tax Court ultimately denied the investors any deductions for losses suffered on the straddle investments when the "loss leg" of the straddle was disposed of in the initial tax year. First, the court concluded that the investment contracts were in fact largely devoid of the economic substance claimed by the investors, since the prices used in the trades had been specifically picked to yield large paper losses and did not conform to the most accurate market prices for the commodities on the date of the contracts; for example, the court found that in one case the claimed economic loss of $95,424 on a trade in fact amounted to a true loss of only $5,754. See 78 T.C. at 378-384. Second, even as to these small actual losses, the court concluded that the investors were not entitled to a deduction because they were essentially assured of coming out nearly even on the total straddle transaction when the gain on the other leg of the straddle was realized in the later year, and thus the losses did not meet the requirement for deductibility that they be incurred in a transaction entered into for profit. See 78 T.C. at 390-394.

balance the account. Thus, while in *Smith* there was actual trading, albeit carefully done to minimize risk, in this case the bogus accounting entries, frequently disregarded or retroactively changed, did not represent any real transactions of actual economic substance.

In addition, the program in *Smith* was an open and above-board attempt to take advantage of a perceived opportunity for deductions under the tax law. By contrast, the scheme here was a disguised operation the true nature of which petitioners attempted to conceal from the Internal Revenue Service and even from its own customers. Beginning with their initial promotion of the scheme, petitioners falsely represented both that the program would attempt to seek an economic profit for its customers and that petitioners' profit would be earned on mark-ups in securities bought from or sold to customers rather than as a percentage of a loss amount "sold" to a customer (GX 102, at 2-4, 8-14). Later inquiries from both customers and the IRS elicited identically false representations from petitioners (GXs 132, 601A, 602B, 604B, 606B, 612). "Trading tickets," designed to convince customers that trades had actually been made, were routinely created by turning back the date on the ticket-stamping machine (Tr. 198-218, 355-363, 469-470, 518-520, 566-567, 574-575, 616-619, 625-626, 856-862, 966-969, 979-981, 1121, 1479-1480). When transactions were backdated, evidence of that fact was ordered destroyed (Tr. 203-206, 981-982, 1112-1113). And indeed, when it became known that the Internal Revenue Service planned to audit SFI, petitioner David Senft ordered the removal of numerous documents that he apparently believed to be incriminating (Tr. 997-999, 1582(10)-1582(11); GX 519).

These attempts by petitioners to conceal the true nature of their operation clearly indicate that they knew that their scheme bore little resemblance to arguably bona fide "tax shelter" programs, such as that in-

volved in *Smith*, but instead amounted to pure fraud. It has long been held, and obviously was well-known to petitioners, that purported transactions without any economic effect will be disregarded for tax purposes and cannot properly be the basis for deductions. See, *e.g.*, *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 573 (1978); *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945); *Higgins* v. *Smith*, 308 U.S. 473, 477 (1940); *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935). Accordingly, courts have regularly sustained criminal tax convictions based on sham transactions involving fraudulent intent. See, *e.g.*, *United States* v. *Baskes*, 687 F.2d 165 (7th Cir. 1981); *United States* v. *Conforte*, 624 F.2d 869, 873-875 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *United States* v. *Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Clardy*, 612 F.2d 1139, 1151-1153 (9th Cir. 1980); *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1068 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Raub*, 177 F.2d 312, 313-314 (7th Cir. 1949). Indeed, in at least two cases, convictions under the same statutes at issue here have been upheld for activities that, like those of petitioners, nominally utilized "tax straddles" but lacked substance overall. See *United States* v. *Turkish*, 623 F.2d at 771; *United States* v. *Siegel*, 472 F. Supp. 440, 441-443 (N.D. Ill. 1979), aff'd *sub nom. United States* v. *Winograd*, 656 F.2d 279 (7th Cir. 1981), cert. denied *sub nom. Siegel* v. *United States*, 455 U.S. 989 (1982); see also *United States* v. *London*, 753 F.2d 202 (2d Cir. 1985); *United States* v. *Coven*, 662 F.2d 162 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982).[5]

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[5] Petitioners suggest in passing (Pet. 13-14) that the district court's instruction to the jury was inconsistent with *Smith*. For the reasons previously discussed, however, *Smith* is distinguishable from this case and does not affect the correctness of the instruc-

Additionally, this case presents no "fair warning" problem under the Due Process Clause because the crimes of which petitioners were convicted require specific intent to commit prohibited acts. Such a scienter requirement "reliev[es] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); see also *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 343 (1952); *United States* v. *Ragen*, 314 U.S. 512, 524 (1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502-503 (1925). As this Court stated in *Ragen*, 314 U.S. at 524, "[a] mind intent upon willful evasion is inconsistent with suprised innocence." Thus, since the jury in this case, in order to convict, was specifically required to find (see C.A. App. 41-42) that petitioners engaged in acts that they knew to be prohibited, and since that finding is not challenged and is amply supported by the record, petitioners' claim of lack of notice of the illegality of their conduct is plainly without merit.[6]

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tion here. Moreover, the Tax Court in *Smith* in fact *denied* the investors' deductions because the losses were not incurred in transactions entered into for profit (see page 7 note 4, *supra*). Similarly here, there would be no transaction for profit if, as the district court instructed the jury, the purported transactions "in their totality * * * were not intended to have and in fact had no economic substance or significance" (C.A. App. 41); consequently, petitioners' scheme was illegal because it was designed to create tax deductions for ostensible losses that, under well-established principles, were not deductible.

[6] In light of the clearly illegal nature of their scheme, petitioners err in relying (Pet. 14-15) on *United States* v. *Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), cert. denied, No. 83-1297 (May 14, 1984). *Dahlstrom* concerned advocacy of the use of a tax shelter whose legality "was completely unsettled." In that circumstance, the court held only that "the first amendment barred prosecution for advocacy of conduct which did not violate existing law." *United*

2. Petitioners argue (Pet. 16-24) that the district court erred in (a) refusing to give a proposed jury instruction concerning their alleged reliance on accountants and (b) excluding proffered testimony concerning alleged consultations between a business associate of petitioners' and his attorneys. The court of appeals correctly held that these trial rulings were not erroneous (Pet. App. 3a-4a).

a. Initially, petitioners contend (Pet. 17-21) that the district court's action punished them for not relinquishing their Fifth Amendment right not to testify at trial. This contention rests on the mistaken premise that the court refused the instruction because petitioners declined to take the witness stand themselves and offer personal testimony that they had relied on the accountants. Contrary to petitioners' assumption, the district court's ruling was properly based on the conclusion that there was no evidence in the record—whether in the form of testimony from petitioners or otherwise—to indicate any such reliance by petitioners (Tr. 1951-1957). Thus, this ruling did not implicate petitioners' Fifth Amendment rights.[7]

Similarly, the district court's rejection of the proposed instruction did not violate petitioners' Sixth Amendment right to present a defense. The refusal to instruct the jury as petitioners requested—that it should acquit

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States v. *Little*, 753 F.2d 1420, 1434 (9th Cir. 1984). That reasoning plainly has no application here.

[7] Accordingly, no conflict exists with *United States* v. *Phillips*, 217 F.2d 435, 440-443 (7th Cir. 1954), in which the court ruled that a defendant was entitled to a "reliance on advice" instruction even though the evidence of reliance was introduced by the prosecution rather than the defense. That decision is entirely consistent with the district court's refusal to give such an instruction in this case because of the absence of any supporting evidence whatever.

if it found that petitioners relied in good faith on the advice of fully informed accountants that their operation was legal (see Pet. 17-18 n.8)—was properly based on the fundamental rule that a trial court should not give a defense instruction that is not supported by any evidence. See, *e.g.*, *United States* v. *Bowman*, 720 F.2d 1103, 1105 (9th Cir. 1983); *United States* v. *Agard*, 605 F.2d 665, 667 (2d Cir. 1979); *United States* v. *Saettele*, 585 F.2d 307, 309 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Patrick*, 542 F.2d 381, 386 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). In this case, there was no evidence that the accountants gave petitioners any advice, much less informed advice, that the tax benefits claimed for their program were legally available (Pet. App. 3a-4a). While petitioners assert (Pet. 17-18) that the accounting firm for SFI and SGS gave those operations "clean" bills of health, the very member of that accounting firm on whose testimony petitioners rely made it clear at trial that those opinions had nothing whatever to do with the propriety of the claimed tax benefits for the transactions, but rather were merely opinions that those entities' financial statements fairly represented their financial positions in accordance with accepted accounting principles (Tr. 1737-1740).

Furthermore, any "advice" from the accountants could not be considered to have been "informed," since they were never advised of the routine backdating of transactions, the payment of fees for trading confirmations through rigged transactions in which SGS purportedly "lost" money to other dealers, and the numerous additional improprieties involved here (Tr. 661-662, 707-709, 1720-1721, 1729-1733). Nor have petitioners shown that the district court's ruling prejudiced them in any event, since the court properly instructed the jury on the issues of willfulness and specific intent

(C.A. App. 69-71, 77-78), and defense counsel repeatedly argued in summation that petitioners' contacts with their accounting firm showed that they did not possess such intent (Tr. 2049, 2153, 2155, 2159, 2226-2230, 2232-2236, 2247-2252, 2272-2273, 2283-2284).

b. Likewise, contrary to petitioners' argument (Pet. 21-24), the district court properly declined to allow testimony by Joseph Vitrella, an employee of one of the dealers that engaged in purported trading with SGS. Vitrella assertedly would have testified that he mentioned to petitioner Orchard that attorneys for Vitrella's firm had found nothing illegal on that firm's part in engaging in trading with SGS. The district court properly found that the proffered testimony was irrelevant (see C.A. App. 149-155). The alleged opinion of the attorneys for Vitrella's firm that that firm had not acted illegally in "trading" with SGS did not in any way bear on the issue whether the tax benefits held out to customers by SFI and SGS had or could have been believed to have had a legitimate basis in law. And, as above, there was no showing either that the attorneys were adequately informed (or informed at all) about petitioners' operations or that petitioners relied on the opinion of the attorneys.

Indeed, the overall pattern of evidence negated any inference that petitioners could have relied on the purported opinion of Vitrella's attorneys. At the time of Vitrella's alleged conversation with Orchard, petitioners' general scheme had long been in operation in the form of SFI, and the additional vehicle involving the purported trading between SGS and other dealers was already developed and had been proposed by petitioners to Vitrella's firm and to at least one other dealer (Tr. 634-637, 710, 753-761, 858-861, 913-916, 956-957, 1388-1394). Thus, no reasonable argument could have been made that petitioners devised and operated their

program in reliance upon the purported opinion of Vitrella's attorneys that arose so late in the sequence of events. Accordingly, the district court did not err in excluding the proffered testimony as not being probative of any relevant matter.

3. Petitioners and co-defendant Frank Susi were tried on a total of 63 counts of conspiracy to commit fraud, attempted tax evasion, and aiding and assisting the filing of false tax returns. The jury could reach a verdict only as to certain counts, on which petitioners were convicted; as to the remaining counts, including those involving Susi, a mistrial was declared on the ground of a hung jury. See C.A. App. 390-392, 477. Petitioners claim (Pet. 24-26) that the verdicts rendered by the jury on some but not all counts of the indictment were not intended by all jurors to be final, thus depriving petitioners of their right to a unanimous verdict.

This fact-bound claim is plainly belied by the record. During its consideration of the case, the jury sent the district court a note that it could "not come to a unanimous decision" (C.A. App. 476). After further deliberations, the jury sent a second note stating (C.A. App. 477):

> We have reached a unanimous decision on some of the counts, but cannot reach a unanimous decision on others. We do not feel that additional deliberation will help at all.

The district court, without objection from defense counsel, then brought in the jury (C.A. App. 390-392) and took its verdicts on those counts on which, in the jury's words, it had "reached a unanimous decision." The individual jurors were polled, and each affirmed the verdicts convicting petitioners (C.A. App. 392).

These proceedings demonstrate that the jury considered its verdicts to be unanimous and final. The jury's

note expressly stated that unanimous decisions had been reached on some counts, and the contemporaneous understanding of the parties at the trial likewise was that those verdicts represented a binding determination of guilt. Indeed, the jury specifically requested that it be relieved from further deliberations at that point, a request that is flatly inconsistent with petitioners' claim on appeal that the jury contemplated additional proceedings and did not consider its verdicts of guilty to be final. As the district court found (Tr. 2670):

> [T]he note makes it perfectly clear that they regarded their duties as at an end [when they returned the note]. They not only had decided the things they were going to decide but on the things they hadn't decided they felt further deliberations would not help at all. This was not attentive [*sic*, a tentative] vote. This was a rendering of a verdict on those counts that they were unanimous on but they were not able to reach a unanimous decision on others and felt that further deliberations would not help at all. So, I don't see this as attentive [*sic*, a tentative] vote. They had no expectation of having further deliberations.

After taking the jury's partial verdict, the district court asked the jurors to continue deliberating on the other counts (C.A. App. 392). These deliberations ultimately proved fruitless, but at one point the jury issued a further note to the court, inquiring (C.A. App. 479) "[s]hould each count from 2 to 27 be judged collectively or individually determined?" Pointing to the fact that certain of the counts on which the guilty verdicts had previously been returned were included in Counts 2 through 27, petitioners assert (Pet. 25 (emphasis in original)) that this note "clearly indicate[s] that [the jury] had not in fact understood that, by reporting its partial verdicts, it was reporting *final* verdicts."

Contrary to petitioners' assertion, this note does not detract from the above conclusion that the partial verdicts were unanimous and final. Rather, the note is ambiguous and is most plausibly read, in the overall context, to mean that the jury was unclear either (1) whether its verdicts of guilty on the related counts required it to convict petitioners on the remaining counts as well, or (2) whether it should find all of the defendants, "collectively," guilty on the remaining counts, as it had in the counts on which verdicts had already been returned, or whether it was to consider them "individually." However the note is construed, it cannot reasonably be taken to contradict the jury's previous understanding, clearly indicated by the record, that its partial verdicts were a unanimous and final disposition against petitioners on those counts.[8]

Thus, as the court of appeals concluded (Pet. App. 6a), "nothing in the instant case indicates that the jury's partial verdict was intended to be anything but final, and the district court correctly treated it as such."[9]

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[8] Petitioners also suggest (Pet. 25 n.13) that a note from an individual juror to the district judge well after the partial verdicts were taken, which stated that the juror felt that she had been "pressured" into the verdicts because she was "outnumbered" (C.A. App. 478), indicates that the partial verdicts were not unanimous and final. It is well established, however, that a verdict cannot be impeached by testimony or evidence of a juror's mental processes in agreeing to the verdict. See, *e.g.*, Fed. R. Evid. 606(b); *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984), slip op. 9; *Rushen* v. *Spain*, 464 U.S. 114, 121 n.5 (1983); *Mattox* v. *United States*, 146 U.S. 140, 148-149 (1892). This rule is fully applicable to the partial verdicts at issue here. See, *e.g.*, *United States* v. *Hockridge*, 573 F.2d 752, 756-760 (2d Cir.), cert. denied, 439 U.S. 821 (1978); *United States* v. *Cotter*, 60 F.2d 689, 690-691 (2d Cir.), cert. denied, 287 U.S. 666 (1932).

[9] Petitioners' reliance (Pet. 25) on *United States* v. *DiLapi*, 651 F.2d 140, 146-147 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982), is misplaced. First, an asserted intracircuit conflict provides no

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, contrary to petitioners' interpretation, *DiLapi* does not establish a rigid rule that a district court must formally advise a jury that its verdict is final before accepting a partial verdict. Rather, *DiLapi* involved the district court's decision not to take a partial verdict, which was affirmed in the circumstances of that case. The court of appeals' statement in *DiLapi* that partial verdicts should not be based on "tentative votes" (651 F.2d at 147) has no application where, as here, the jury clearly intended to return a final verdict. See also *United States* v. *Burke*, 700 F.2d 70, 80 (2d Cir.), cert. denied, 464 U.S. 816 (1983).